

No. 77-1029

Supreme Court, U. S.

FILED

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MICHAEL RODAY, JR., CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1977

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**AMBROSE W. J. CLAY, PETITIONER**

**v.**

**ROBERT L. BOMAR, JR.**

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**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SIXTH CIRCUIT**

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**MEMORANDUM FOR THE RESPONDENT  
IN OPPOSITION**

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**WADE H. MCCREE, JR.,**  
*Solicitor General,*  
*Department of Justice,*  
*Washington, D.C. 20530.*

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Petitioner, an employee of the Veterans Administration, filed this action in the United States District Court for the Middle District of Tennessee, alleging that respondent, a VA physician, made libelous statements about him in a hospital memorandum. At the hearing on respondent's motion to dismiss, petitioner stated that he was not asserting a claim against the VA, but that his action was solely against the respondent personally. He added that respondent had acted beyond the scope of his employment in making the allegedly defamatory statements (Pet. App.).

On the basis of these representations, the district court on December 2, 1976, dismissed the action for lack of subject matter jurisdiction (Pet. App.). Petitioner filed a

notice of appeal on April 22, 1977, almost five months after the district court had entered final judgment against him (Pet. 4). The court of appeals dismissed the appeal for failure to file a notice of appeal within the 30-day period provided for in Fed. R. App. P. 4(a).

The decision of the court of appeals is correct. A timely notice of appeal is "mandatory and jurisdictional" under Rule 4(a) and 28 U.S.C. 2107. *United States v. Robinson*, 361 U.S. 220, 229. The importance of Rule 4(a) in setting a "definite point of time when litigation shall be at an end" was reaffirmed by this Court in *Browder v. Director, Department of Corrections of Illinois*, No. 76-5325, decided January 10, 1978, slip. op. 7. Because the final judgment was entered by the district court on December 2, 1976,<sup>1</sup> the notice of appeal should have been filed by January 3, 1977.<sup>2</sup> Even if petitioner had successfully moved for a 30-day extension on grounds of excusable neglect (Fed. R. App. P. 4(a); 28 U.S.C. 2107), his notice, filed on April 22, 1977, still would have been some 12 weeks late.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,  
*Solicitor General.*

MARCH 1978.

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<sup>1</sup>Petitioner did not file a motion for reconsideration by the district court.

<sup>2</sup>Petitioner did not sue respondent in his official capacity. Accordingly, the 60-day period for filing a notice of appeal in cases in which the United States or a federal agency or officer is a party was inapplicable. See *Michaels v. Chappell*, 279 F. 2d 600 (C.A. 9), certiorari denied, 366 U.S. 940; *Hare v. Hurwitz*, 248 F. 2d 458 (C.A. 2). In any event, even under the 60-day provision petitioner's notice of appeal would have been untimely.